STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2011
v	No. 296677 Saginaw Circuit Court
ELRICK DELMAR COOPER, Defendant-Appellant.	LC No. 07-029814-FC

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529, and possession of a firearm in the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 25 to 50 years' imprisonment for armed robbery and a consecutive two years for felony-firearm. We affirm.

On October 8, 2007, a man wearing a ski mask and appearing to wield a small handgun robbed the Fast Lane Drive-Thru Party Store at 1200 State Street in Saginaw. Police responded to the scene and, based on the reports of witnesses who observed the robber flee the scene, were able to track defendant down at a nearby apartment. While a search of this apartment was conducted, defendant was detained. Police found money hidden behind the refrigerator and inside a fuse box, as well as a number of items lying on the ground outside an open bathroom window, including a ski cap and a small handgun. Defendant was then taken into custody.

At trial, the prosecution presented DNA evidence from sweat found on the ski cap, handgun, and a "do rag." Although the results from the handgun were inconclusive, the results from the cap and do rag were highly consistent with defendant's DNA. The forensic scientist who collected the DNA swabs from the handgun and the other items also testified that the trigger on the handgun had been welded shut and that, to her knowledge, the operability of the handgun had not been tested by the police. Defendant was convicted as charged, and this appeal ensued.

Defendant first argues on appeal that he could not be legally convicted of felony-firearm because the trigger mechanism on the weapon had been welded shut. We disagree. MCL 750.222(d) defines "firearm" in part as "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air." Thus, the statute does *not* require the current operability of the weapon." *People v Peals*, 476 Mich 636, 653; 720 NW2d 196 (2006).

Defendant relies on obiter dictum from *Peals* to assert that his inoperable weapon does not constitute a firearm under MCL 750.222(d). In footnote seven, the Supreme Court recognizes that there could be situations where an inoperable firearm would not satisfy the statutory definition because of the design or alteration:

> While the statute does not contain an operability requirement, it is possible that a firearm could be so substantially redesigned or altered that it would cease to be a "firearm" under the statutory definition. It would no longer be a weapon whose design was such that a dangerous projectile "may be propelled" by an explosive, gas, or air. For example, an antique cannon plugged with cement on display in a park would not constitute a "firearm" under MCL 750.222(d). That is because the cannon has been converted into an ornamental display, and it is no longer the type of weapon that is used or designed to propel dangerous projectiles by an explosive or by gas or air. We emphasize, however, that the operability of the weapon is not the statutory test; rather, the question is whether the weapon has been so substantially redesigned or altered that it no longer falls within the category of weapons described in MCL 750.222(d). [*Id*. at 652 n 7.]

Unlike the hypothetical cannon referred to in *Peals*, however, the handgun in this case had not been redesigned or altered in a way to remove it from the statutory definition. "That a gun is inoperable does not alleviate the extreme danger posed by its possession in these circumstances." *Id*. at 653.

Because the handgun used by defendant constitutes a firearm under MCL 750.222(d), we necessarily reject defendant's assertion that counsel rendered ineffective assistance by failing to request that the jury be instructed that the weapon used by defendant met the substantial alteration exception carved out in *Peals*. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).[1]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

[1] Derivative of his argument with respect to *Peals*, defendant refers to instructing the jury using the language of MCL 750.222(d). Having failed to show that the dictum of footnote seven is applicable, the court's instructing in accord with the statute and its judicial interpretation was not erroneous. See *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).